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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAVIER ADOLFO VIERA, Defendant and Appellant.	B285882 (Los Angeles County Super. Ct. No. BA458979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed in part, reversed in part, and remanded with directions.

Lori A. Quick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Javier Viera of two counts of arson and one count of aggravated arson for lighting two fires on victim W.B.'s garage door at two different times on the same day. Over defendant's objection, the trial court allowed the prosecutor to play to the jury a redacted video defendant had sent to W.B. prior to the fires. The video showed defendant dressed in women's clothing imitating a serial killer character from a popular film. The trial court sentenced defendant on all three counts, including, pursuant to Penal Code[1] section 667, subdivision (a)(1), two 5-year enhancements for defendant's prior serious felony convictions.

Defendant contends (1) the two fires constituted only one crime because the fires were to the same structure; (2) because arson is a lesser included offense of aggravated arson, he could not be convicted of aggravated arson and the related arson count; (3) admission of the redacted video was error because it was irrelevant and unduly prejudicial under Evidence Code section 352; and (4) remand is necessary so that the trial court may consider striking the prior serious felony enhancements under a recent statute making imposition of the enhancements discretionary.[2]

We conclude the two fires constituted two separate crimes. Accordingly, defendant could properly be charged and convicted on both arson counts (counts 1 and 2). However, because arson is a lesser included offense of aggravated arson, defendant could not

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[1] Undesignated statutory citations are to the Penal Code.

[2] At the time defendant filed his appellate briefs in 2018, the statute was not yet in effect. As set forth below, the statute took effect on January 1, 2019 and applies retroactively to defendant.

be convicted of aggravated arson and the related arson count. Accordingly, we reverse the conviction on the arson count (count 2) that the prosecutor represented was alleged in the alternative to the aggravated arson count (count 3) and affirm the aggravated arson conviction.

We also conclude the trial court did not err in admitting the redacted video because it was probative of defendant's motive to set fires to W.B.'s property and was not unduly prejudicial despite its sexual content in light of the overwhelming evidence of guilt. In any event, any error admitting the redacted video was harmless. Finally, we remand for resentencing in light of our reversal of one of the arson counts (count 2) and so that the trial court may exercise its newly granted discretion to strike the prior serious felony enhancements.

FACTUAL BACKGROUND

1. 1999 to November 2015: Defendant and W.B.'s friendship deteriorated

Since 1999, defendant lived next door to W.B. They were friends and socialized together. At some point, defendant moved out of the neighborhood but returned in November 2015. Sometime between November 2015 and May 2016, defendant "[k]ind of [asked W.B.] for sex." Specifically, defendant sent a video of himself to W.B. via text message. The video showed defendant dancing in women's clothing to a song, similar to a scene in the film "Silence of the Lambs" (Orion Pictures 1991) where the serial killer character danced in women's clothing to the same song that played in the background of defendant's

video.[3] At the end of the video, defendant exposed his penis. W.B. told defendant, "Don't be sending me those videos." W.B. then stopped socializing with him. We set forth additional facts regarding the video in subsection C of the discussion below.

2. April or May 2016 to August 2016: Fires occurred in defendant and W.B.'s neighborhood, and neighborhood residents involved the fire department

In April or May 2016, fires began occurring in defendant and W.B.'s neighborhood. Around May 10, 2016, defendant's brother assaulted W.B. W.B. obtained a restraining order against defendant's brother. Later in May 2016, W.B.'s recreational vehicle was lit on fire. W.B. reported that fire to a captain at the fire station. Following an August 2016 neighborhood meeting about the fires with fire department personnel, W.B. and his neighbors installed surveillance cameras on their homes at the advice of the fire department. W.B. installed cameras on his front and back porches.[4] Defendant and his family did not attend that meeting. In August 2016, W.B. put his house up for sale.

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[3] The video played to the jury had no audio. W.B. testified as to what music he heard on the video. Apparently, the audio was erased during the redaction process described in the procedural background, *post*.

[4] Our record does not include footage from W.B.'s back porch camera.

3. November 10, 2016: Two fires were lit on W.B.'s garage door

On November 10, 2016, about five minutes after defendant walked down the stairs that lead from his home to the sidewalk, smoke emanating from W.B.'s garage was visible.

At about 2:35 p.m., a witness noticed a small fire coming through W.B.'s wooden garage door while he was driving to visit his sister in the neighborhood. The witness extinguished the fire with a blanket and beverage he had in his vehicle. He called the real estate agent listed on the for sale sign in front of W.B.'s house. W.B.'s real estate agent then told W.B. his garage was on fire. W.B. emerged from his house, and the witness told him about the fire. W.B. saw smoke and a burnt area of his garage door but no more flames. W.B. reviewed his surveillance camera footage, recognized defendant in that footage,[5] and contacted a fire department investigator he met at the August 2016 neighborhood meeting.

Los Angeles police officers arrived at the scene and observed a burn mark on the front of the garage. When W.B. and one of the officers were in W.B.'s backyard, W.B. overheard

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[5] The footage from the front porch camera was provided to us in two video files. The first video file shows: (1) defendant pacing on the sidewalk in front of his and W.B.'s homes, and then walking toward W.B.'s garage at approximately 15 minutes into the video; (2) smoke emanating from W.B.'s garage at approximately 20 minutes; and (3) the witness driving by at approximately 24 minutes. The second video file shows: (1) defendant pacing on the sidewalk and walking toward W.B.'s garage at approximately 17 minutes into the video, and (2) W.B. and other people gathering around W.B.'s garage at approximately 22 minutes.

defendant or defendant's brother yell, " 'I'm going to kill that faggot.' " Defendant returned to the scene 16 minutes after the police left and paced near W.B.'s garage.

About 30 minutes after W.B. called them, two fire department investigators arrived and saw defendant come around the corner of W.B.'s garage. The investigators got defendant's attention and asked defendant to remove his hands from his pockets. Defendant said, " 'I didn't do it. People are blaming me for everything. I didn't do anything.' " One of the investigators told defendant he needed to speak with him. Defendant said he would return in 10 minutes, turned, and walked down the street.

That investigator then went to W.B.'s garage and observed a one-inch-high flame "burning up on the bottom of the garage door," the garage door smoldering, and melted plastic at the base of the garage door. After photographing the fire, the investigator extinguished the fire with a bottle of water he retrieved from his vehicle. Defendant did not return in 10 minutes. The investigators waited for him for an hour. Over the next four hours, they called defendant over 10 times. On their last attempted phone call, the investigators reached defendant, who said he had nothing to do with the garage door fires.

4. Investigators found two distinct burn patterns

Upon investigating the scene, the investigators observed two distinct burn patterns, which they gleaned from different heat intensity and charring in two different places. They also observed missing wood from the piece of wood that ran along the bottom of the garage door, a burnt edge, and charring of the garage door wood. The investigators concluded someone deliberately started the fires because no electricity ran to W.B.'s

garage, thus minimizing the likelihood that the fires were accidental.

PROCEDURAL BACKGROUND

We set forth below the procedural background relevant to this appeal.

The People charged defendant with two counts of arson under section 451, subdivision (c)[6] (counts 1 and 2), which the People alleged were serious felonies under section 1192.7, subdivision (c), and one count of aggravated arson (count 3) "as to count(s) 1 and 2" under section 451.5, subdivision (a)[7].

The People also alleged defendant had 10 prior arson convictions and one prior attempted arson[8] conviction all dated

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[6] "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property. [¶] . . . [¶] (c) Arson of a structure or forest land is a felony punishable by imprisonment in the state prison for two, four, or six years." (§ 451, subd. (c).)

[7] "A person who willfully, maliciously, deliberately, with premeditation, and with intent to cause injury to one or more persons, or to cause damage to property under circumstances likely to produce injury to one or more persons, or to cause damage to one or more structures or inhabited dwellings, sets fire to, burns, or causes to be burned, or aids, counsels, or procures the burning of any residence, structure, forest land, or property, is guilty of aggravated arson if one or more of the following aggravating factors exists: [¶] (1) The defendant has been previously convicted of arson on one or more occasions within the past 10 years." (§ 451.5, subd. (a)(1).)

[8] "Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the

July 14, 2014, which are serious or violent felonies as defined in section 667, subdivision (d) and section 1170.12, subdivision (b). Accordingly, defendant was subject to sentencing pursuant to the "Three Strikes" law (§§ 667, subd. (b)–(j), 1170.12). The People further alleged that one of the alleged prior arson convictions was a serious felony within the meaning of section 667, subdivision (a)(1). Finally, the People alleged that none of defendant's prior convictions had washed out for purposes of the prior prison enhancement in section 667.5, subdivision (b).

Defendant brought a motion in limine to exclude the video he sent to W.B. Defendant argued the video was irrelevant and unduly prejudicial because it was sexually explicit, would offend jurors, and was sent at least five and a half months before W.B.'s recreational vehicle was lit on fire. The trial court concluded the video was relevant to the prosecutor's theory that defendant intended to burn W.B.'s garage because W.B. had "turned him down." The trial court acknowledged the potential prejudice and ordered the redaction of the last few seconds of the video in which defendant exposed his penis. Ultimately, the trial court allowed the prosecutor to play the redacted video for the jury and to elicit a description of the redacted portion from W.B.

In addition to W.B., the witness, a police officer, and the two fire department investigators testified at trial. Also, the prosecutor played W.B.'s surveillance camera footage and the redacted video.

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burning of any structure, forest land or property, or who commits any act preliminary thereto, or in furtherance thereof, is punishable by imprisonment in the state prison for 16 months, two or three years." (§ 455, subd. (a).)

The jury convicted defendant of all three counts. In the subsequent bench trial, the trial court found true as to all three counts the allegations of the prior 11 convictions, as well as the serious felony allegations under section 667, subdivision (a)(1), the prior prison allegations under section 667.5, subdivision (b) as to all three counts, and the allegations as to counts 1 and 2 under section 451.1, subdivision (a) that defendant had previously been convicted of a felony violation of section 451 or 452.

In his sentencing memorandum, defendant sought dismissal of his "strike" priors pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The trial court denied that motion. Defendant does not challenge the trial court's *Romero* ruling on appeal.

Defendant also argued that he could be sentenced only on one arson count because all the counts arose out of the "same operative facts" and with "a single intent." According to defendant, section 654 barred "multiple punishment for these acts." The trial court disagreed, reasoning that the two arson counts and the aggravated arson count had different elements and that the two arson counts involved separate crimes.

The trial court sentenced defendant to an aggregate prison term of 55 years to life pursuant to the Three Strikes law, plus two 5-year prior enhancements pursuant to section 667, subdivision (a)(1) with custody credit for 672 days. More specifically, the trial court sentenced defendant to 30 years to life plus five years for the section 667, subdivision (a)(1) enhancement on count 3, and 25 years to life plus five years for the latter enhancement on count 1. As to count 2, the trial court imposed a sentence of 25 years to life to run concurrently with

the sentences on count 1 and count 3 but stayed that sentence pursuant to section 654. The trial court struck all the prior prison allegations pursuant to section 1385. Finally, the trial court ordered defendant to pay certain fines and fees, register as an arson offender, and submit to DNA testing. We set forth additional facts about the sentencing hearing in subsection D below.

Defendant timely appealed.

STANDARD OF REVIEW

We review issues of statutory interpretation and other questions of law de novo. (*People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1276.) We review a trial court's evidentiary findings for abuse of discretion, and will reverse only if " ' " 'the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " ' " (*People v. Jones* (2017) 3 Cal.5th 583, 609.)

DISCUSSION

A. Defendant Was Properly Convicted Of Two Counts Of Arson Crimes Because The Two Garage Door Fires Each Resulted In A Separate Charring

Defendant argues he can be convicted of only one count of arson because he set fire to a single structure—W.B.'s garage door. We disagree.

In *People v. Haggerty* (1873) 46 Cal. 354, the defendant was convicted of arson when a fire was set on a wood floor causing the charring of a spot on the floor. The fire was extinguished quickly after discovery. (*Id.* at pp. 354–355.) The defendant contended

he could have been convicted only of attempted arson because there was an insufficient burning. (*Id.* at p. 355.) In response, our Supreme Court adopted the following definition of "burn" within the meaning of arson: " '[T]he burning of any part, however small, completes the offense, the same as of the whole. Thus, if the floor of the house is charred in a single place, so as to destroy any of the fibers of the wood, this is a sufficient burning in a case of arson.' " (*Ibid.*) Thus, "the burning of any part, however small, completes the offense, the same as of the whole." (*Ibid.*)

Similarly here, defendant started the first fire, thus causing charring to part of the garage door and completing the crime of arson. About 60 to 90 minutes later, defendant started the second fire, which caused another part of the garage door to char, thus completing a second crime of arson.

Additionally, the first fire was extinguished before defendant lit the second fire about 60 to 90 minutes later. Further, defendant placed plastic material at the second fire to ensure it was strong enough to ignite the garage door itself, but did not start the first fire in the same manner. The investigators also testified that the second fire did not start by a natural rekindling of the first fire. Thus, in lighting two separate fires, each of which caused a charring, at two different times using two different methods, defendant committed two crimes of arson.

Defendant avers the statute's plain language—particularly, " 'any structure' "—"means the burning of a single house, building, or structure of any kind." Defendant further contends this is true even where the burning was caused by multiple fires set at different points on a given structure and the "person [who] set[those] fire[s] . . . succeeds in burning the structure down."

Defendant's contentions do not account for the definition of "burn" or the facts adduced at trial. Specifically, defendant did not simply burn the garage door at two different locations on the door. Defendant set fire to the garage door at two different times, setting the second fire after the first was extinguished. He fled the scene of the first fire, and subsequently returned to start the second fire with the plastic material. Each of those fires caused charring.

Further, defendant's theory taken to its logical conclusion would allow an arsonist to avoid liability for a subsequent crime of arson upon a structure, even one occurring years after the first such crime, merely by burning a different part of that structure. We find no support for such a defense. Indeed, defendant acknowledges he could not find any.[9]

In sum, there was no error in convicting defendant of two counts of arson.

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[9] Defendant relies on *People v. Coyle* (2009) 178 Cal.App.4th 209 by analogy. There, a defendant was improperly convicted of three separate counts of murder for killing one victim. The appellate court accepted the prosecutor's concession that the defendant could be convicted of only one count of murder and noted, "[t]he three counts simply alleged alternative theories of the offense." (*Id.* at p. 217.) *Coyle* is obviously distinguishable because a victim can die only once. In contrast, here defendant caused two separate fires on two separate occasions each resulting in different charrings, thus committing two separate arson crimes.

B. Defendant Could Not Be Convicted Of Arson On Count 2 And Aggravated Arson on Count 3 Because Count 2 Is A Lesser Included Offense of Count 3

Defendant argues because the arson alleged in count 2 is a lesser included offense of the aggravated arson charged in count 3, he cannot be convicted of both crimes. Respondent agrees as do we.

" 'When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed.' " (*People v. Aguayo* (2019) 31 Cal.App.5th 758, 762.) Here, there is no dispute that arson is the necessarily lesser included offense of aggravated arson. (See §§ 451, 451.5; *People v. Muszynski* (2002) 100 Cal.App.4th 672, 684.)

Although the information did not allege count 3 as an alternative to count 2, the prosecutor made that representation at the sentencing hearing. Accordingly, we reverse defendant's conviction for arson in count 2.

C. The Trial Court Did Not Abuse Its Discretion In Admitting The Video Of Defendant Imitating The Serial Killer Character From "Silence Of The Lambs"

Defendant argues the trial court erred in not excluding the video he sent to W.B. under Evidence Code section 352. That section grants trial courts the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice." (Evid. Code, § 352.) Defendant argued the video was

prejudicial because its sexual content would offend jurors. We have reviewed the video and conclude there was no error in admitting it.

1. Additional background regarding the video

Defendant sent W.B. the video via text message. W.B. identified defendant as the sender because the sender's phone number matched defendant's, which number W.B. stored in his own phone. The video shows defendant dancing in women's clothing sometimes revealing women's undergarments. The video lacked sound, but W.B. testified defendant was dancing to a song that W.B. recognized as background in the film "Silence of the Lambs." The video scared W.B. because he associated it with that film and recognized the video as portraying the "image" of a dancing man dressed in women's clothing in that film. At the end of the video, defendant "pulls his privates out and shakes it."

2. The video tended to prove defendant's identity, willfulness, malice, and motive, and was not unduly prejudicial

Defendant contends the video was not relevant because the prosecutor commented she did not know defendant's motive. Specifically, defendant argues the redacted video demonstrated nothing about his state of mind and only showed W.B. felt " 'creeped out' "; W.B.'s state of mind, however, was irrelevant.

The trial court found the video was relevant because "it indicates [1] the relationship between" defendant and W.B., and "[2] a potential motive as to why the defendant may have burned" W.B.'s garage door. Additionally, defendant acknowledges the trial court believed the existence of the video explained why W.B. rebuffed defendant's purported sexual advances and defendant,

in turn, lit the fires to W.B.'s garage. Given that arson requires willfulness and malice, "[m]otive is always relevant in a criminal prosecution," and the prosecutor had to prove defendant was the person who lit the fires, the video was probative of those elements. (§ 451, subd. (a); *People v. Perez* (1974) 42 Cal.App.3d 760, 767.) Indeed, the prosecutor argued in closing to the jury that the video proved defendant's malice.

Defendant argued the video was prejudicial because of its sexual content. As set forth above, the trial court redacted the portion of the video showing defendant exposing his penis, thus minimizing that prejudice.

Any error in admitting the redacted video, moreover, was harmless given the weighty evidence of guilt adduced at trial, including the surveillance video footage showing defendant at the scene around the time of the fires, the testimony about W.B.'s rejection of defendant's sexual advances, the restraining order against defendant's brother and lighting on fire of W.B.'s recreational vehicle soon thereafter, and defendant's evasive behavior when being questioned by the fire investigator. (*People v. Watson* (1956) 46 Cal.2d 818.)

D. Remand Is Necessary To Allow The Trial Court To Exercise Its Discretion To Strike The Serious Felony Enhancements Under Recent Statutory Amendments Giving Courts Discretion To Do So

Defendant was convicted and sentenced in 2017. His sentence included two 5-year serious felony enhancements pursuant to section 667, subdivision (a)(1). We allowed supplemental briefing on whether we should remand so that the trial court may exercise discretion awarded it under recent statutory amendments to strike those enhancements. In his

supplemental brief, defendant argues the amendments apply to him because the case is not yet final. He further contends the trial court did not indicate it would not exercise that discretion if the court had it. The People argue such a remand would be futile because during the sentencing hearing, the trial court indicated it would not strike the enhancements even if it had discretion to do so. We conclude defendant has the better argument.

"Effective January 1, 2019, recent amendments to sections 667 and 1385 delete language prohibiting a judge from striking a prior serious felony conviction for purposes of eliminating a five-year sentence enhancement. Instead, the court now may exercise discretion to strike a prior serious felony in the interest of justice." (*People v. Pride* (2019) 31 Cal.App.5th 133, 142, petn. for review pending, petn. filed February 13, 2019; accord, *People v. Marquez* (2019) 31 Cal.App.5th 402, 414, petn. for review pending, petn. filed February 15, 2019.) These amendments are contained in Senate Bill No. 1393 (2017–2018 Reg. Sess.) (S.B. 1393).

Initially the People argued that defendant's request for remand was premature because S.B. 1393 was not yet effective. They, however, concede that S.B. 1393 would apply retroactively to a case not final. Because S.B. 1393 became effective during the pendency of this appeal, defendant's case is not yet final and defendant's request for consideration under S.B. 1393 is not premature. (*People v. Vieira* (2005) 35 Cal.4th 264, 305–306.)

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to

"sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.] But if ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) In sum, "remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a[n] . . . enhancement." (*Ibid.*)

The trial court's remarks and actions during the sentencing hearing do not indicate it would never strike the serious felony enhancements. For example, the trial court exercised its discretion under section 1385 not to impose the prior prison enhancement on any of defendant's prior convictions. Also, over the prosecutor's objection, the trial court exercised its discretion to stay the sentence on count 2. At the hearing, the trial court also stated he was "indicat[ing] to the appellate court" that "if I was required to sentence [defendant] as to this particular section, 451.1, I would make the extra time concurrent to all the other time I'm going to give him." On this record, we cannot conclude the trial court would not have stricken the section 667, subdivision (a)(1) enhancements if it had the discretion to do so at the time of the sentencing hearing.

DISPOSITION

Defendant's convictions on counts 1 and 3 are affirmed. His conviction on count 2 is reversed. Defendant's sentence is vacated, and the matter is remanded to the trial court for resentencing. The trial court shall then also determine whether to strike any enhancement imposed under section 667, subdivision (a)(1). The trial court shall amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.